Supreme Court, U.S.
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No. 90-1855

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ROBERT PRICE, and all others similarly situated, DELORIS BLANCO, RONALD RAFFO, ET AL.,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTERNATIONAL UNION, UNITED AUTOMOBILE,AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION,LOCAL 571, UAW, AFL-CIO,

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REPLY TO BRIEF IN OPPOSITION

The opposing brief notably abandons any disagreement with petitioners' argument and assertion that there exists an explicit conflict among the circuits between the decision below in *Price* and the Sixth Circuit's decision against the Auto Workers in *Cramer v. Matish*, Pet. 11a, as well as with the First Circuit in *Linscott v. Miller Falls Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971), *cert. denied*, 404 U.S. 872 (1981), and the Ninth Circuit in *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996, 1002-04 (9th Cir. 1970). Maintenance of a uniform judicial agency fee standard for the benefit of workers and unions under federal labor policy must be preferred over the development of a dual system of judicial standards countenanced by the court below for workers under the

Railway Labor Act ("RLA") and those workers laboring under the National Labor Relations Act ("NLRA" or "Act").

I. DENIAL OF THE PETITION FOR WRIT OF CERTIORARI WILL LEGITIMIZE DISREGARD FOR THE COURT'S RULINGS IN *BECK*

As set out in the Petition, this case presents two alternative considerations. First, whether the union security provisions of the RLA and NLRA should be treated identically when "in 1951, Congress expressly modeled § 2, Eleventh on § 8(a)(3), which it had added to the NLRA only four years earlier, and repeatedly emphasized that it was extending 'to railroad labor the same rights and privileges of the union shop that are contained in the Taft-Hartley Act.' 96 Cong. Rec. 17055 (1951) (remarks of Rep. Brown)." *Communication Workers v. Beck*, 487 U.S. 735, 746 (1988). If this proposition is not true, then the NLRA governmental action question left open in *Beck*, 487 U.S. at 761-62, must be addressed to confront the "serious constitutional question that would otherwise be raised by a construction permitting unions to expend governmentally compelled fees on political causes that nonmembers find objectionable," which the court below chose to do.

The court of appeals below concluded that because this Court "expressly declined to rule on the state action issue" in *Beck*, Pet. App. 6a, *Beck* "does not in any way modify this Court's prior determination that the union shop agreement" results from private action "not attributable to the government," because the NLRA lacks the express statutory language of preemption as does the RLA.[1] Pet. App. 6a. Resolution of the petitioners' First Amendment challenge by the court below now requires this Court to address whether the enactment of the union security provision of the NLRA in § 8(a)(3) infuses "governmental action" into NLRA collective bargaining agreements, even when

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[1]That opinion was vacated by this Court in light of *Beck*, *Price v. International Union, UAW*, 487 U.S. 1229 (1988), *vacating*, 795 F.2d 1128 (2d Cir. 1986).

this Court has found the statutory language in both laws "nearly identical...regardless of whether the negotiation of union security agreements under the NLRA partakes of governmental action." *Beck*, 487 U.S. at 762.

The respondents agree with the court of appeal's proposition that the Congress' authorization of the union shop clause in § 8(a)(3) did not add to any powers private parties already had and could have necessarily agreed to before the Act, including the proposition that money could be taken out of the paychecks of protesting workers for political purposes. *See* Opp. at 5. Relying upon the Court's test in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), they suggest petitioners have not demonstrated the framework for state action in the NLRA through a passing reference to *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991) (peremptory racial challenges unconstitutional).

There, this Court acknowledged that a deprivation caused by a right or privilege created by the state includes, "[l]egislative authorizations, as well as limitations." Thus, but for the enactment of § 8(a)(3), "[i]t cannot be disputed that without the overt, significant participation of the government, the peremptory challenge system [union security], as well as the jury trial system [collective bargaining system] of which it is a part, simply could not exist." *Id.* at 2084. "The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity *subordinates* the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182, 186 (1967) (emphasis added).

But the framework of state action suggested by the petitioners (and not contradicted in the opposing brief) is based upon the infusion of authority granted to exclusive labor representatives by Congress in the Act. In *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192, 198-202 (1956), the Court explained that the RLA necessarily encompassed a restriction on union power to discriminate because of Congress' creation of the power of exclusive representation ("a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a

legislature to give equal protection to the interests of those for whom it legislates"). *See Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1133 (1991) ("Our decisions have long recognized that the need for such examination [of private union agreements] proceeds directly from the union's status as exclusive bargaining agent.").

At common law, unions had no right to act as the exclusive representative for any employees but those that voluntarily chose to submit to representation. Prior to the Act, workers were free to join and free not to join or pay union dues.[2] Under the interposed labor principle of exclusive representation, individual worker contracts must yield to collective-bargaining agreements. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944). Bargaining by individual workers is strictly prohibited and dissatisfied workers who circumvent their exclusive representatives are not only subject to legal action, but are unprotected as to their concerted activities and may be fired without recourse. *Emporium Capwell Co. v. Western Addition Comm. Org.*, 420 U.S. 50, 72 (1975) (picketing); *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 192 (1967) (union fines).

The respondents' belief that state action made a fundamental difference to this Court's decision in *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and therefore "its state action holding has no application to cases arising under the *National Labor Relations Act*," is misplaced. Opp. at 6. The basis for their reading of *Hanson* is that section 14(b) of the Act, allows states to override union security provisions whereas the RLA does not contain such a provision. Maintenance of this distinction for purposes of § 8(a)(3) completely undermines the linkage

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[2]Since Connecticut has never implemented NLRA § 14(b), the federal statute is the action which establishes and empowers the private parties (employer and union) to require union security and authorizes fee collection by judicial action.

to statutory intent in both the NLRA and the RLA as explained in *Beck*.[3]

Statutory construction must place the burden upon unions to process agency fee plans under the RLA and the NLRA alike. This is the unmistakable intent of the Court in *Beck*, *see* Pet. at 11, where the Court not only believed that "[o]ur decision in *Street* however, is far more than merely instructive here: we believe it is *controlling*, for § 8(a)(3) and § 2, Eleventh are in all material respects identical," 487 U.S. at 745, but also stated "we think that Congress intended the same language to have the same meaning in both statutes." *Id.* at 746-47 (emphasis added). *See* Pet. at 14.

As showed in the Petition at 15-16, the First and Ninth Circuits in *Linscott v. Miller Falls Co.* and *Seay v. McDonnell Douglas Corp.*, respectively, have found the NLRA infused with state action and otherwise have followed the Court's agency fee rulings in *Hanson* and *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961), as guidance in interpreting section 8(a)(3) of the Act to avoid the constitutional challenge of the NLRA. The respondents' vigorous attempt to discredit these two obvious circuit conflicts due to the intervening decision in *Jackson v. Metropolitan Edison*, 419 U.S. 345 (1974), and based on *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983), is diminished in light of

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[3]Respondents' suggest that if exclusive representation is the key to state action in *Hanson*, it would jeopardize the holdings in *Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982). However, neither case applied state action to the NLRA. Weber never raised the constitutional question in his case. *See* Petitioner's Brief at 46, 12 *BNA Law Reprints* No. 13 (1978/79 Term) ("This case arises under Title VII. No claim for relief based on the constitution is presented."). *Sadlowski* involved an internal union matter between voluntary union members under the Landrum-Griffin Act, not the NLRA.

the Court's more recent decision in *Beck*, which supports the analysis of the First and Ninth Circuits.[4]

Clearly, the Court's most recent guidance upon which a union would charge agency fees forcefully applies equally in the public and private employment sectors. In *Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950 (1991), every member of the Court agreed that its rulings in *Hanson*, *Street*, and *Railway Clerks v. Allen*, 373 U.S. 113 (1963) "are cases of statutory construction," 111 S. Ct. at 1957 (Blackmun, J); 111 S. Ct. at 1967 (Marshall, J) (joining in Part I of Justice Blackmun's opinion), not constitutional adjudications. Justice Scalia's concurring opinion agrees that "*Street, Ellis [v. Railway Clerks,*, 466 U.S. 435 (1984)] and *Beck*, were statutory cases." 111 S. Ct. at 1978. If this is so, then the court of appeals was incorrect in finding RLA agency fee standards to be based upon the constitution rather than upon the statute itself and concomitantly failed to equally apply the same protections to the petitioners.

The court of appeal's decision to treat the *statutory* duty of unions under the NLRA and the RLA differently is inconsistent

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[4]Neither the First nor Ninth Circuits have chosen to withdraw their opinions in light of *Beck* or other precedent of this Court. Contrary to the respondents' statement that Judge Tamm in *Kolinske v. Lubbers*, 712 F.2d 471, 480-81 n.9 (D.C. Cir. 1983), suggested the First Circuit "has backed away from the state action analysis in *Linscott*," Opp. at 7 n.9, Judge Tamm stated nothing of the sort. Rather he pointed out that the D.C. Circuit's opinion finding no state action was expressly contrary to the "two other circuits which have faced this issue have reached an opposite result." *Id.* Further Judge Tamm's reference to the result in *Hovan v. United Bhd. of Carpenters & Joiners*, 704 F.2d 641, 645 (1st Cir. 1983), was to note that there a union loyalty oath was held to be outside constitutional review. The First Circuit in Hovan specifically found no state action in the union's oath since Hovan had no "private right...'being invaded' by 'force of' any 'agreement.'" 704 F.2d at 643 *quoting Hanson*. Furthermore, the First Circuit determined "we need not call *Linscott* into question to conclude that no governmental action is present here," *id.*, thereby reaffirming that a union security agreement does invade an individual's private right and partakes of government action, whereas entry qualification for union membership does not.

with this Court's decisions, raises substantial questions for millions of workers, and requires exercise of supervisory action by this Court to correct the error before further circuit conflicts arise.

II. WHETHER THE UNIONS' REBATE PROCEDURE THAT ADMITTEDLY FAILS TO PROVIDE THE SAME PROCEDURAL PROTECTION TO NON-MEMBERS AS THAT REQUIRED UNDER THE RLA, IS ADEQUATE TO MEET THE DUTY OF FAIR REPRESENTATION UNDER THE NLRA, RAISES ISSUES OF LAW THAT REQUIRE THIS COURT'S ATTENTION

Petitioner seeks review of three substantial legal questions yet to be resolved by this Court. First, whether the respondents can deny the release of information to workers concerning chargeable expenditures of its local union under a euphemistic "local presumption" that the international union expends a greater percentage of money on non-germane activities than does its local affiliate. Second, whether it is sufficient for a union to take an audited financial statement and extract from the auditor's report data as to what shall be deemed chargeable to non-members without the auditor verifying that money in the categories established by the union for chargeability were expended, and therefore are chargeable to the non-members for those purposes. Third, whether *mutual* selection of an arbitrator by *both* the nonmembers and the unions is a necessary element of the selection of an impartial *decisionmaker*.[5]

The respondents' opposition demonstrates that labor organizations have little interest in treating non-union workers equally in the interest of fairness and that equality of treatment is not inherent in the unions' view of their duty of fair representation. This should surprise the Court and would come as a surprise to the Congress as well. Because equality of treatment

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[5]These propositions are not fact specific as respondents contend. Opp. at 4. They involve principles universally applicable to union agency-shop procedures.

is precisely the interest at stake in this case under the duty of fair representation, in fairness, the respondents should not be able to treat their non-members disparately, *i.e.*, providing non-members working in the Sixth Circuit in *Cramer v. Matish*, Pet. App. 47a, *with* information concerning local expenses and *denying* the instant respondents access to the same information based upon the very same discredited "local presumption." The respondents' opposition fails to address their disparity of treatment and the conflict with *Cramer*.

a. The court of appeals called the respondents' post-*Beck* agency fee payer plan "a rebate plan." 5a. The union asserts it is not a rebate plan despite the court of appeal's characterization because, although the unions have taken 85.4% of petitioners money without first having established that any of that amount is chargeable at all by an independent audit, they placed the money in escrow pending review. This process makes it a rebate plan despite later decisionmaker review of the unions' records.

What respondents submitted to petitioners was an $830 million audited financial report of 86 pages of single-line financial data, C.J.A. 193-279, plus a sixteen page *unaudited* summary of charges to non-members, C.J.A. 280-295. Moreover, the respondents' summary expenditure Report reports the allocation of broad categories of audited expenses of solely the *international union* said by it to be chargeable and non-chargeable to the non-member petitioners. Disclosure to petitioners of any of this respondent *local union's* chargeable expenses is expressly refused contrary to the Sixth Circuit's direction to the International in *Cramer*.

b. The Auto Workers union must presently provide an *audited* informational summary to non-members based upon the Sixth Circuit's decision in *Cramer v. Matish*, *see* Wellford, J., 55a-58a, as well as local affiliate disclosure to them to satisfy their *Hudson* obligations. The Sixth Circuit in *Tierney v. City of Toledo*, 917 F.2d 927, 936 (6th Cir. 1990), presently imposes the requirement that the auditor also verify that chargeable expenses determined by the unions were actually expended by them: "Disclosure of the

major categories of expenses and the methodology of the agency fee calculations means very little if the non-members cannot have some level of confidence in the verification of expenditures." Petitioners agree. *See* Pet. 23-24.[6] The Second Circuit's disagreement on this point with the Sixth Circuit further raises the question of fairness in the treatment of nonmembers. Pet. App. 10a; *Andrews v. Education Ass'n*, 829 F.2d 335 (2d Cir. 1987).

c. Finally, respondents do not dispute that consensual arbitration is the hallmark of impartial decisionmaking accepted in all private disputes including labor matters. Pet. 26. They do not dispute that the "arbitration" procedure and rules unilaterally developed for use against the petitioners is unique in American experience and might suggest the appearance of bias. Yet, they would claim the propriety of this process is satisfactory under the duty of fair representation as falling "within the 'wide range of reasonableness'" explained in *Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1130 (1991), Opp. at 11, when the Court actually stated that "a union's actions are arbitrary only if, *in light of the factual and legal landscape at the time of the union's actions*, the union's behavior is so far outside a 'wide range of reasonableness..., as to be irrational.'" *Id.* (citation omitted). The respondents' exhortation that RLA and public sector agency fee procedures should not apply to NLRA workers is admittedly contrary to all judicial precedent on this issue (*Hanson*, *Ellis*, and *Beck*) and should be rejected by this Court at this time.[7]

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[6]The respondents have not disagreed that *Cramer* is *res judicata* against the international union. *See* Pet. 22 n.15.

[7]The respondent's attempt to suggest that the statement of the court of appeals that "the mere appearance of bias...was not sufficient to render these procedures constitutionally suspect," Pet. 11a, does not mean what it says, is erroneous. Either the court of appeals was admitting that AAA bias exists in the union developed procedure or it concluded there can readily be said to exist the appearance of AAA bias in union fee litigation, but that the court found this was not sufficient to invalidate the arbitration of agency fee matters under the duty of fair representation. As established in the Petition at 26, this Court has always required that arbitration be consensual and must avoid the appearance of bias.

CONCLUSION

This case presents two critical issues left open in *Beck* concerning whether the same protections apply to workers under the NLRA as are applied under the RLA. The conflict of procedural law in the Sixth and Second Circuits dealing with the same union highlights the need for this Court's review.[8]

For these reasons, petitioners respectfully request that a writ of *certiorari* issue to review the judgment of the court of appeals.

Respectfully submitted,

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Dated: September 6, 1991

Petitioners submit that neither is true here.

[8]The respondents have not objected to petitioners' suggestion that the statutory construction question, that RLA and NLRA agency shops must be treated alike, might be addressed by an order of summary reversal. *See* Pet. 20 n.14.